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## SENATE BILL No. 584

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### DIGEST OF INTRODUCED BILL

**Citations Affected:** IC 24-3-6.

**Synopsis:** Prohibiting sale of gasoline below cost. Prohibits a retailer: (1) from selling or offering to sell gasoline below retailer cost or above a maximum sale price, with certain exceptions; (2) from offering a rebate or concession in connection with the sale of gasoline under certain circumstances; (3) or an affiliate from offering other items that, when combined with the selling price of the gasoline, reduce the selling price to below an allowable minimum under certain circumstances. Authorizes the attorney general or a prosecuting attorney to seek civil penalties or an injunction for violations. Authorizes a person who is injured or threatened with injury by below cost sales of gasoline to seek an injunction or monetary damages.

**Effective:** July 1, 2005.

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January 20, 2005, read first time and referred to Committee on Commerce and Transportation.

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First Regular Session 114th General Assembly (2005)

PRINTING CODE. Amendments: Whenever an existing statute (or a section of the Indiana Constitution) is being amended, the text of the existing provision will appear in this style type, additions will appear in **this style type**, and deletions will appear in ~~this style type~~.

Additions: Whenever a new statutory provision is being enacted (or a new constitutional provision adopted), the text of the new provision will appear in **this style type**. Also, the word **NEW** will appear in that style type in the introductory clause of each SECTION that adds a new provision to the Indiana Code or the Indiana Constitution.

Conflict reconciliation: Text in a statute in *this style type* or ~~this style type~~ reconciles conflicts between statutes enacted by the 2004 Regular Session of the General Assembly.

## SENATE BILL No. 584

A BILL FOR AN ACT to amend the Indiana Code concerning trade regulation.

*Be it enacted by the General Assembly of the State of Indiana:*

1 SECTION 1. IC 24-3-6 IS ADDED TO THE INDIANA CODE AS  
2 A **NEW** CHAPTER TO READ AS FOLLOWS [EFFECTIVE JULY  
3 1, 2005]:

4 **Chapter 6. Below Cost Sales of Gasoline**

5 **Sec. 1. As used in this chapter, "affiliate" means a person who,**  
6 **other than by means of franchise, controls, is controlled by, or is**  
7 **under common control with another person. The term includes a**  
8 **person in a business relationship concerning the retail sale of**  
9 **gasoline.**

10 **Sec. 2. As used in this chapter, "average posted terminal price"**  
11 **means the arithmetic mean posted rack price by grade, as**  
12 **published by a petroleum price reporting service, at which gasoline**  
13 **is offered for sale at the close of business on the determination date**  
14 **by all refiners, suppliers, and wholesalers of gasoline at a terminal,**  
15 **plus:**

16 (1) **excise, sales, or use taxes imposed on the gasoline or on its**  
17 **sale;**



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(2) cost incurred for transportation; and

(3) other fees or charges that are not included in the arithmetic mean posted rack price.

Sec. 3. As used in this chapter, "competitor" means a person that competes with another person for retail sales of gasoline in the same market area.

Sec. 4. As used in this chapter, "cost of doing business" includes all costs incurred in the conduct of business, including labor costs, salaries of executives and officers, fair market rent value, interest on borrowed capital, depreciation, cost of maintenance of equipment, credit card fees, license fees, taxes, insurance, and advertising costs, for a retail location or an unattended location, determined in accordance with generally accepted accounting principles.

Sec. 5. As used in this chapter, "customary discount for cash" means an allowance made to a retailer when payment is made for gasoline within a specified time.

Sec. 6. As used in this chapter, "determination date" means:

(1) if a retailer sells gasoline on a day other than the day on which the retailer last purchased gasoline and the sale of the gasoline by the retailer occurs not later than ten (10) days after the last purchase of gasoline by the retailer, the date selected by the retailer from:

(A) the day preceding the day of sale of gasoline by the retailer; or

(B) the day on which gasoline was last purchased by the retailer; or

(2) if subsection (1) does not apply, the day preceding the day of the sale at retail of gasoline.

Sec. 7. As used in this chapter, "existing price of a competitor" means a lawful price being offered simultaneously to a buyer of gasoline of like quality and quantity by a competitor of the:

(1) refiner;

(2) retailer; or

(3) wholesaler of gasoline.

Sec. 8. As used in this chapter, "gasoline" has the meaning set forth in IC 6-6-1.1-103(g).

Sec. 9. As used in this chapter, "invoice" means the following:

(1) A document that is issued by a refiner or supplier to a wholesaler or retailer showing a sale of gasoline and that contains the invoice cost of the gasoline.

(2) A document that is issued by a wholesaler to a retailer

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showing a sale of gasoline and that contains the invoice cost of the gasoline from an invoice issued by a refiner or supplier to the wholesaler.

Sec. 10. As used in this chapter, "invoice cost" means the following:

(1) For a sale of gasoline from a refiner or supplier to a wholesaler or retailer, the greater of:

(A) the sale price shown on the invoice from the refiner or supplier to the wholesaler or retailer; or

(B) the price generally available from the refiner or supplier to wholesalers and retailers who are not affiliates from a terminal at which the refiner or supplier sells or offers to sell gasoline to wholesalers and retailers who are not affiliates.

(2) For a sale of gasoline by a wholesaler to a retailer, the greater of:

(A) the sale price shown on the invoice from the wholesaler to the retailer; or

(B) the price the wholesaler paid the refiner or supplier for the gasoline.

Sec. 11. As used in this chapter, "maximum sales price" means the retail sales price measured as:

(1) cost to the retailer; plus

(2) a retailer margin in an amount equal to a tax imposed on gasoline by a government.

Sec. 12. As used in this chapter, "person" has the meaning set forth in IC 4-3-19-3.

Sec. 13. As used in this chapter, "petroleum price reporting service" means a wholesale petroleum product price reporting service that is recognized nationwide.

Sec. 14. As used in this chapter, "rack" has the meaning set forth in IC 6-6-1.1-103(r).

Sec. 15. As used in this chapter, "rack price" means the price paid for the gasoline by the retailer from the supplier at the rack.

Sec. 16. As used in this chapter, "refiner" has the meaning set forth in IC 6-2.5-7-1.

Sec. 17. As used in this chapter, "replacement cost" means the cost at which a retailer could have purchased gasoline on the determination date if the gasoline had been purchased in the same quantity as the quantity in which gasoline was last purchased by the retailer.

Sec. 18. As used in this chapter, "retail location" means an

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outlet where a retailer sells gasoline.

Sec. 19. As used in this chapter, "retailer" means a person that does the following:

(1) Maintains a storage facility for gasoline.

(2) Sells gasoline at a retail location or an unattended location to the public or to members, who are the end users.

Sec. 20. As used in this chapter, "retailer cost" means the lesser of the following:

(1) The lesser of the:

(A) invoice cost of the gasoline to the retailer on the determination date; or

(B) replacement cost of the gasoline on the determination date;

plus taxes imposed on the gasoline, cost incurred for transportation, other fees or charges not otherwise included in the invoice cost or the replacement cost of the gasoline, and the cost of doing business component, minus customary discount for cash.

(2) The:

(A) average posted terminal price on the determination date at the terminal located closest to the retailer; and

(B) cost of doing business component.

Sec. 21. As used in this chapter, "sale" or "sells" means a transfer of property for consideration. The term includes an advertising or offer to sell. In determining a retail sales price of gasoline, all fractions of one (1) cent shall be rounded to the next additional cent.

Sec. 22. As used in this chapter, "supplier" has the meaning set forth in IC 6-6-1.1-401.

Sec. 23. As used in this chapter, "terminal" means a gasoline storage and distribution facility that is supplied by a pipeline or marine vessel and from which gasoline may be removed at a rack. If two or more terminals are included in the same geographic area by a petroleum price reporting service, they are considered one (1) terminal for purposes of this chapter.

Sec. 24. As used in this chapter, "unattended location" means a sales outlet where:

(1) a retailer sells gasoline; and

(2) the presence of an attendant at the time of a sale is not required by law.

Sec. 25. As used in this chapter, "wholesaler" has the meaning set forth in IC 6-6-2.5-27.

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1       **Sec. 26. (a) Except as provided in subsection (b), a retailer shall**  
 2 **not sell or offer to sell gasoline:**

3       **(1) below retailer cost at a retail location or at an unattended**  
 4 **location; or**

5       **(2) above the maximum sales price at a retail location or**  
 6 **unattended location.**

7       **(b) It is not a violation of subsection (a) to establish a retail sales**  
 8 **price for gasoline in good faith to meet an existing price of a**  
 9 **competitor located in the same market area selling the same or**  
 10 **similar product of like grade and quality.**

11       **Sec. 27. A retailer shall not offer:**

12       **(1) a rebate; or**

13       **(2) a concession;**

14 **in connection with the sale of gasoline at a retail location or an**  
 15 **unattended location if the resulting sale price is below retailer cost.**

16       **Sec. 28. (a) A retailer or an affiliate of a retailer shall not**  
 17 **advertise, offer for sale, or sell gasoline and another item at a**  
 18 **combined price if the combined selling price is below the retailer**  
 19 **cost of the gasoline and the basic cost of the other item.**

20       **(b) A retailer or an affiliate of a retailer shall not advertise,**  
 21 **offer for sale, or sell gasoline if the sale would include or includes**  
 22 **giving a coupon for free or discounted items or gifts and the**  
 23 **combined selling price of the gasoline and other item or gift is**  
 24 **below the sum of the retail cost of the gasoline, the face value of the**  
 25 **coupon, and the basic cost of the item or gift.**

26       **Sec. 29. (a) Except as provided in subsection (b), this chapter**  
 27 **does not apply to a retail sale made:**

28       **(1) in an isolated transaction and not in the usual course of**  
 29 **business;**

30       **(2) when gasoline is advertised, offered for sale, or sold in a**  
 31 **bona fide clearance sale for the purpose of discontinuing trade**  
 32 **in gasoline;**

33       **(3) when gasoline is advertised as imperfect or damaged;**

34       **(4) when gasoline is sold upon the final liquidation of a**  
 35 **business;**

36       **(5) when gasoline is sold by a fiduciary or an officer under the**  
 37 **order of a court; or**

38       **(6) during a grand opening to introduce a new or remodeled**  
 39 **retail location if the grand opening is held:**

40       **(A) for not more than three (3) days; and**

41       **(B) within sixty (60) days after the new or remodeled**  
 42 **location begins operation.**

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(b) Gasoline described in subsection (a)(2) and (a)(3) shall be kept separate from other stock and legibly marked with the reason for the sale, and advertising for the sale shall state the reason for the sale and the quantity of gasoline to be sold.

**Sec. 30.** An express or implied contract that violates this chapter is void and unenforceable.

**Sec. 31. (a)** A person that violates section 26(a), 27, or 28(a) of this chapter is subject to a civil penalty of not more than two thousand five hundred dollars (\$2,500) for each violation of section 26(a), 27, or 28(a) of this chapter, subject to a maximum of ten thousand dollars (\$10,000) for each day of violation if multiple sale violations occur in a day. All civil penalties recovered under this chapter shall be paid to the state. The attorney general or the prosecuting attorney of a county in which a violation of this chapter is alleged to have occurred may institute an action under this subsection.

(b) In addition to seeking a civil penalty under subsection (a), the prosecuting attorney of the county in which the prohibited sale set forth in section 26(a), 27, or 28(a) of this chapter has occurred may maintain an action in the name of the state of Indiana to enjoin a person from violating section 26(a), 27, or 28(a) of this chapter.

(c) An injunction issued under this section or a civil penalty imposed under this section does not relieve a person from an action under section 32 of this chapter brought by an injured person or a person threatened with an injury.

(d) Each day that a violation of section 26(a), 27, or 28(a) of this chapter continues constitutes a separate violation.

**Sec. 32. (a)** A person that is injured or threatened with an injury as a result of a sale or purchase of gasoline in violation of section 26(a), 27, or 28(a) of this chapter may bring an action against the refiner, retailer, or wholesaler of gasoline committing the violation. The action may be brought for:

(1) temporary or permanent injunction; or

(2) damages equal to the greater of:

(A) three (3) times the monetary loss; or

(B) \$5,000 for each day the violation continues;

together with costs of the action and attorney's fees. The action may be brought in the aggregate for each sales outlet in a market area that is alleged to have violated section 26(a), 27, or 28(a) of this chapter.

(b) A person seeking an injunction under this section is not

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1      **required to post a bond.**

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